Supreme Court, U.S.
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No. 93-611

In The

Supreme Court of the United States

October Term, 1993

THE CONTINENTAL INSURANCE COMPANY,

Petitioner,

v.

GAYLON D. SIMMONS, GLORIA ANNETTE TURNER SIMMONS, AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Continental Insurance Company ("Continental"), Petitioner herein, has filed a petition for writ of certiorari that duplicates in substance the pending petition for writ of certiorari (*BDO Seidman, et al. v. Simmons,* No. 93-313) previously filed by Continental's co-appellees in the proceedings below.[1] Continental neither raises issues, nor asserts any special standing that distinguishes its petition from the pending petition in Case No. 93-313.

REASONS FOR DENYING THE WRIT

Respondents have filed a Brief in Opposition to the petition in Case No. 93-313. The arguments and authorities relied on therein respond directly to the arguments that Continental now makes in favor of granting the writ. Therefore, Respondents have incorporated the substantive text of their previous response in Case No. 93-313 as an Appendix to this Brief in Opposition.

Since the filing of the Brief in Opposition in Case No. 93-313, the United States Court of Appeals for the Sixth Circuit has denied the petition for rehearing in *Plaut v. Spendthrift Farms, Inc.*, 1 F.3d 1487 (6th Cir. 1993). Therefore, Respondents now withdraw the argument that review of this case would be premature before final disposition of *Plaut*. *See* Appendix at App. 9. Respondents respectfully submit, however, that the other arguments

[1] Continental is the successor in interest to Harbor Insurance Co., a party to the proceedings below in both the district and appellate courts.

put forth in their earlier Brief in Opposition provide good and sufficient reason for denial of the writ.

In light of the duplicative filing by Continental, Respondents request that the Court take notice of the fact that Case Nos. 93-313 and 93-611 arise out of the same proceedings below and involve identical facts and issues of law. In the interest of judicial economy, Respondents respectfully request that these two cases be consolidated in order that the Court and the parties may be relieved of the burden of preparing, filing, processing and reviewing duplicative pleadings and briefs.

Dated: November 19, 1993

Respectfully submitted,

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APPENDIX

No. 93-313

In The

Supreme Court of the United States

October Term, 1993

BDO SEIDMAN, BRACEWELL & PATTERSON, J.C. TEMPLETON, JOE H. FOY, HARRY V. CARLSON, ROBERT TED ENLOE, III, W.A. GRIFFIN, THOMAS L. KISTER, LEONARD LEON, EDWARD T. COTHAM, AND WILLIAM M. TEMPLETON,

Petitioners,

v.

GAYLON D. SIMMONS, GLORIA ANNETTE TURNER SIMMONS, GREENWICH INSURANCE COMPANY, AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners' Statement of the Case, while generally adequate, fails to include two key facts relevant to the Court's decision to deny or grant the petition. *First*, the district court dismissed Respondents' claims under Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78j(b), *without prejudice*. *See* Appendix at A2. The judgment of the district court thus lacked res judicata effect, as the district court specifically recognized. *See* Appendix at A13. *Second*, Petitioners did not appeal the district court's decision to dismiss Respondents' claim without prejudice.

REASONS FOR DENYING THE WRIT

1. The Decision of the Fifth Circuit is Correct.

Section 27A of the 1934 Act is presumptively constitutional. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). The United States Court of Appeals for the Fifth Circuit has tested the presumption in the case of Section 27A and, after detailed analysis, has concluded that Section 27A is consistent with the limitations on legislative and judicial powers set forth in Articles I and III of the Constitution. Seven other Circuit Courts of Appeals have also concluded that Section 27A is constitutional.[1] In the

[1] *Cooke v. Manufactured Homes, Inc.*, No. 93-1005, 1993 U.S. App. LEXIS 17167 (4th Cir. July 9, 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993); *Berning v. A. G. Edwards & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993);

face of both the presumption of constitutionality and the weight of appellate authority, the decision of the Sixth Circuit in *Plaut v. Spendthrift Farms, Inc.*, 1993 U.S. App. LEXIS 19738 (6th Cir. August 3, 1993), stands out as an anomaly. The Court should decline to exercise its discretionary jurisdiction in *this* case, and resolve the conflict created by the Sixth Circuit in a review of *Plaut*, if that case ultimately exits the Sixth Circuit in its present form.

The opinions of the Fifth and Sixth Circuits can be readily compared and conflicts between the two easily identified. The existence of the conflict, rather than the merits of the constitutional issues over which the conflict arises is relevant to the Court's decision to exercise its jurisdiction. Nevertheless, differences in the rationales of the two circuit courts highlight the fundamental correctness of the Fifth Circuit's decision.

The Fifth Circuit supported its decision with a rationale that is consistent with contemporary due process analysis. The opinion of the Sixth Circuit rests largely on subsequently modified authority and a suspect theory of "vested rights." For many years, this Court has properly questioned the practical and theoretical utility of a "vested rights" analysis. As early as 1885, the Court observed that, while the term has some readily accepted meaning in the context of real property rights, "when we get beyond this, although vested rights may exist they are better described by some more exact term, as the phrase

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Anixter v. Home-Stake Production Co., 977 F.2d 1533 (10th Cir.), *reh'g granted in part*, 977 F.2d 1549 (1992), *cert. denied*, 113 S. Ct. 1841 (1993); *Henderson v. Scientific-Atlanta*, 971 F.2d 1567 (11th Cir. 1992), *petition for cert. filed*, June 25, 1993.

itself is not one found in the language of the Constitution." *Campbell v. Holt*, 115 U.S. 620, 628 (1887). Consistent with the Court's view expressed in *Campbell*, the Fifth Circuit has observed that the vested rights analysis begs the question of due process by "merely stat[ing] due process conclusions." *Pacific Mut. Life Ins. Co. v. First RepublicBank Corp.*, 997 F.2d 39, 47 (5th Cir. 1993).[2] Ultimately, the issues now raised before the Court are issues of due process and should be decided "according to the jurisprudence that the Court has developed to describe how due process protects individuals from retroactive legislation." *Id.*

The Petitioners here, and the current Sixth Circuit opinion in *Plaut*, ultimately rely on the authority of *McCollough v. Virginia*, 172 U.S. 102 (1898). As the Fifth Circuit has correctly concluded, the absolutist holding of *McCollough v. Virginia* has been substantially modified in *Fleming v. Rhodes*, 331 U.S. 100 (1947), and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In the proceedings below, Petitioners failed to distinguish *Fleming* and *Usery*, both of which upheld the right of Congress to deprive litigants of rights acquired by judgment and retroactively to create liability for past acts. The Fifth Circuit properly adhered to the guidance of this Court's more recent holdings, which authority superseded *McCollough*. The Sixth Circuit, however, did not consider, much less distinguish,

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[2] *TGX Corp. v. Simmons*, No. 92-3375 (5th Cir. 1992), was consolidated for hearing with *Pacific Mut. Life Ins. Co. v. First RepublicBank Corp.*, and the Fifth Circuit issued a single opinion for both cases reported under the style and caption of *Pacific Mutual*.

the intervening precedent of *Fleming* and *Usery*. Thus, it is the decision of the Sixth Circuit that is in conflict with established precedent of this Court. If any decision needs reviewing, it is the holding of the Sixth Circuit.

Petitioners also claim that Section 27A impermissibly creates liability for past acts and is thus inconsistent with this Court's holdings in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), and *William Danzer & Co. v. Gulf & Ship Island R.R. Co.*, 268 U.S. 633 (1925). Petitioners' argument lacks merit for two reasons. First, the holding in *Usery* that Congress may retroactively create liability for past acts raises a serious question as to the utility of *Danzer* in this analysis. *See Usery*, 428 U.S. at 16. Second, the holding of *Lampf* adopts the standards of Section 9(e) of the 1934 Act, 15 U.S.C. § 78i(e) as governing the limitations periods for actions under Section 10(b). As the Fifth Circuit has correctly observed, Section 9(e) speaks only of limitations on *remedies*; it is silent as to the continued existence of *liability* under the 1934 Act. *See Pacific Mutual*, 997 F.2d at 52.

Finally, the holding of the Fifth Circuit is completely consistent with the Court's recent discussion of Section 27A in *Musick, Peeler & Garrett v. Employers Ins.*, 113 S. Ct. 2085 (1993). In *Musick*, the Court was asked to decide whether an implied right of contribution was available among co-defendants in a private action under Section 10(b). As support for its conclusion that a right of contribution was available, Justice Kennedy, writing for the Court, discussed at some length the curious tension and division of labor between the Court and Congress in the

"cumulative work" of shaping the parameters and defining the content of the implied private cause of action under Section 10(b). Justice Kennedy focused particularly on the enactment of Section 27A:

> Following our resolution two Terms ago of a difficult statute of limitations issue for 10b-5 suits, Congress intervened by limiting the retroactive effect of our decision, and the caution in its intervention is instructive. In an approach parallel to the one it adopted for the insider trading statute, Congress did no more than direct the applicable "limitation period for any private civil action implied under [Section 10(b)] that was commenced on or before June 19, 1991."

Id. at 2089 (quoting Section 27A) (citations omitted).

The Court's discussion of Section 27A and its reliance on such congressional intervention as instructive within the separate spheres of judicial and congressional action, strongly suggests that the Court is content with Section 27A and that further review of the statute is not warranted.

2. Review of the Fifth Circuit's Decision is Premature.

The Sixth Circuit issued its opinion in *Plaut* on August 3, 1993. The United States of America, an intervenor in *Plaut*, has requested and received additional time within which to file a suggestion for rehearing *en banc*. On September 3, 1993, the Sixth Circuit requested briefs from the parties on the merits of the suggestion for rehearing. *See* Appendix at A23. As of this writing, the briefs have not been filed; thus, the ultimate outcome of

Plaut is far from clear. Until the Sixth Circuit has made its decision final, it is premature to maintain that a conflict exists between the Fifth and Sixth Circuits.[3]

3. Even if the Decision of the Sixth Circuit is Upheld, the Result in This Case Will Remain Unchanged.

The scope of the Sixth Circuit's opinion in *Plaut* reaches only those cases in which a final, unappealed judgment has been entered. *See* Respondents' Appendix at A61. Since *Plaut* involved an unappealed judgment of dismissal with prejudice, the issue of finality centered on whether a judgment based upon the passing of a statutory limitations period was "final" for all purposes. The Sixth Circuit concluded that such judgments are final. However, as the dissent in *Plaut* observed, there are instances, such as those created by appealed judgments, that must necessarily fall outside the reach of the Court's ruling and within the statutory reach of Congress. *See* Petitioners' Appendix at A87.

Respondents' Section 10(b) claim, unlike that of the shareholders in *Plaut*, was dismissed *without prejudice*. As this Court has observed in the context of Rule 41(a) of the

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[3] The Court has pending before it a petition for a writ of certiorari filed in the case of *Henderson v. Scientific-Atlanta, Inc.*, 967 F.2d 1567 (11th Cir.); *pet. for cert. filed* June 25, 1993. Although the issues presented in *Henderson* are not framed identically to the issues considered herein, the underlying issue of separation of powers was addressed by the Eleventh Circuit, 986 F.2d at 1571-75. Review of the petition in *Henderson* will afford the Court an opportunity to consider the constitutional dimensions of Section 27A and rule upon them in that case.

Federal Rules of Civil Procedure, "a [d]ismissal without prejudice is a dismissal that does not operate as an adjudication upon the merits . . . , and thus does not have res judicata effect." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990). Since Respondents' claim was dismissed without prejudice, it could be refiled at the trial court level without penalty and not subject to a defense of res judicata. Accordingly, the dismissal was simply not an adjudication on the merits capable of creating in Petitioners a "right" to be free from relitigation of Respondents' claim. On the contrary, by defining the dismissal as without prejudice, the district court clearly signalled the Petitioners that their fight was not over and that refiling was not foreclosed by the dismissal.

In *Plaut*, however, the argument can be made that dismissal *with* prejudice did give rise to the defense of res judicata, which, absent Section 27A, immunized the *Plaut* defendants from relitigation of the claims against them. This crucial distinction between this case and *Plaut* raises the issue whether the holding in *Plaut*, even if upheld by this Court, would require reversal of the judgment of the Fifth Circuit in this case. Respondents submit that the distinction is dispositive. Petitioners claim that, like the defendants in *Plaut*, they cannot be deprived of the rights conferred upon them by a final judgment. However, unlike the defendants in *Plaut*, Petitioners never acquired the right they claim to have lost – the right to be free from relitigation of the Section 10(b) claim brought against them.

The conclusion drawn by the Sixth Circuit in its discussion of *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), highlights the dispositive nature of the

relationship between principles of res judicata and dismissal without prejudice. In *Sioux Nation*, Congress retroactively waived the defense of res judicata previously interposed by the United States to bar relitigation of claims brought by Native Americans. *Id.* at 389. The Sixth Circuit cited *Sioux Nation* for the proposition that the case does not "creat[e] an exception to the longstanding rule against disturbing judgments rendered in favor of private parties," but merely "allows Congress the power only to ratchet the Government's liability to claimants in favor of private parties. . . . " *See* Petitioners' Appendix at A82. In concluding that *Sioux Nation* supported, rather than prohibited, striking down Section 27A, the Sixth Circuit specifically noted that "the very existence of this appeal suggests that defendants have not chosen to waive their defenses of res judicata with which the District Court vested them in dismissing the shareholders' case *with prejudice* as time barred." *Id.* at A83 (emphasis added).

The Sixth Circuit's reference to the dismissal below as having been with prejudice can hardly be gratuitous, particularly in the context of a discussion of res judicata. Implicit in the Sixth Circuit's conclusion is the realization, expressed by this Court in *Cooter & Gell*, that absent a dismissal with prejudice, there would be no res judicata defense available for the defendants to have waived. Thus, even under the holding of *Plaut*, reinstatement of Respondents' claim in this case would not offend due process and the doctrine of separation of powers in the manner condemned by the Sixth Circuit.

Unlike the Sixth Circuit, the Fifth Circuit had before it a non-constitutional basis to reverse the judgment of the district court in *TGX Corp. v. Simmons*. Respondents

argued below that because the dismissal without prejudice lacked res judicata effect, the judgment created in Petitioners no "right," vested or otherwise, of which Section 27A(b) could divest them. Therefore, Petitioners had failed to overcome the threshold of any alleged deprivation of due process. Although the Fifth Circuit had available to it a valid non-constitutional basis for decision in *TGX Corp. v. Simmons*, the same basis was unavailable in *Pacific Mut. Life Ins. Co. v. First RepublicBank Corp.*, which involved a final judgment of dismissal with prejudice. Since the Fifth Circuit was required to reach to full-blown due process and separation of powers issues in *Pacific Mutual*, and since, given the court's decision, the result in both cases would be the same, the Fifth Circuit chose not to rule on the non-constitutional basis of decision in *TGX*.

The Fifth Circuit's election, however, does not foreclose the issue. If the petition is granted, this Court will necessarily consider the procedural, non-constitutional grounds for upholding the decision of the Fifth Circuit before reaching the constitutional issues presented. *Jean v. Nelson*, 472 U.S. 846, 854 (1985). *See also The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959) (petition for certiorari dismissed after oral argument when it became apparent that the case could be decided as a matter of contractual law rather than by reference to a federal statute). In that event, Respondents submit that the Court will conclude, in reliance on *Cooter & Gell*, that the procedural argument raised, but not ruled on below, is sufficient to dispose of this case.

The procedural grounds for affirming the Fifth's Circuit are unique to this case. On the other hand, the constitutional issues, *if* a conflict about them survives

rehearing in the Sixth Circuit, are squarely presented in both *Plaut* and *Pacific Mutual*. Thus, either of those cases will be better suited for review.

4. The Conflict Created by the Decision of the Sixth Circuit is Limited in Duration and Scope.

The terms of Section 27A restrict the statute's application to the limited number of cases that were (1) brought under Section 10(b) of the 1934 Act, (2) pending on June 19, 1991, and (3) dismissed as time barred as a result of *Lampf*. The sub-set of cases falling within Section 27A(b) affected by the conflict between the Fifth and Sixth Circuits is further limited to Section 27A cases dismissed in a final judgment and reinstated within a sixty day safe harbor. Simple logic compels the conclusion that the entire universe of cases hanging on this "important question of federal law," Petitioners' Brief at 14, can contain no more than a handful of lawsuits.

Section 27A is a statute that has expired under its own terms. This fact ensures that the issues presented for review arising *under this statute* will not recur. The brief duration of the statute, combined with the meager number of remaining cases renders review of Section 27A by the Court inappropriate. *See United States v. Abrams*, 344 U.S. 855 (1952); *Community Services, Inc. v. United States*, 342 U.S. 392 (1952), and the discussion in R. Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 466-67 (1953).

CONCLUSION

The decision of the Fifth Circuit below is correct and consistent with the opinions of this Court. The opinion of the Sixth Circuit, which created the conflict upon which the petition is based, is anomalous and inconsistent with contemporary due process analysis. Therefore, if the Court determines that the conflict of opinion merits review, the Court is urged to review and reverse the holding of the Sixth Circuit. Moreover, review is premature until the judgment of the Sixth Circuit becomes final. Finally, the Court should decline to exercise its discretionary jurisdiction in this case because narrower, non-constitutional grounds exist for upholding the result reached by the Fifth Circuit in a manner consistent with the holding of the Sixth Circuit.

Respectfully submitted,

Dated: September 24, 1993

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